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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE BROOKLYN UNION GAS COMPANY,

Petitioner,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Respondent,

and

THE CITY OF NEW YORK,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Did the New York State Court of Appeals deprive the Petitioner of due process of law under the Fifth and Fourteenth Amendments when, after holding that reproduction cost new less depreciation ("RCNLD") was the exclusive measure of value for tax purposes, it subverted its own ruling by totally ignoring the fact that the only credible evidence of RCNLD submitted at the trial and contained in the record on review was that of the Petitioner and denying Petitioner any opportunity for a hearing and ruling on the merits of that evidence by summarily dismissing the petition? Despite Petitioner's motion for reargument, which again expressly drew the Court's attention to the existence in the record of Petitioner's extensive RCNLD evidence and the serious Constitutional issue raised by the Court's summary disposition, the Court took no action to address either matter, thus effectively denying Petitioner any opportunity for a ruling on the merits of the case.

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Record Citation

This Petition involves the Constitutionality of the Court of Appeals' summary dismissal of Petitioner's petition for judicial review of the State's tax assessment of its special franchise property. The transcripts and exhibits of the trial court were certified to the Court of Appeals as Volumes I and II of the Record On Appeal, and are cited in this Petition as follows:

> "R." refers to the page in the transcript of the trial court proceeding.
>
> "Ex." refers to the Petitioner's exhibits received in evidence at the trial.

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THE BROOKLYN UNION GAS COMPANY,

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STATE BOARD OF EQUALIZATION AND ASSESSMENT,

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THE CITY OF NEW YORK,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

The opinion of the New York Court of Appeals is reported at 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) and is set forth in Appendix A hereto.[1] The opinion of the intermediate appellate court—New York Supreme Court, Appellate Division, Third Judicial Department—is reported at 101 A.D.2d 414, 477 N.Y.S.2d 693 (1984) and is set forth in Appendix B hereto. The opinion of the trial court—Supreme Court, Albany County—dated May 24, 1983, was not reported and is set forth in Appendix C hereto.

[1] In addition to the parties listed in the case caption, the following parties filed briefs *amici curiae* in the Court of Appeals proceeding: the New York State School Boards Association, Nassau County, Westchester County, certain Westchester municipalities supporting the position of the SBEA, and the New York State Public Service Commission in support of the position of Brooklyn Union.

Jurisdiction

This case involves a Constitutional challenge to a decision of the New York Court of Appeals on the ground that the Court's disposition of the case has violated Petitioner's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The New York Court of Appeals arbitrarily dismissed the Petitioner's petition for judicial review of its special franchise property assessment for the year 1980-81 and thus denied Petitioner any opportunity for a judicial ruling on the merits of that asssessment. This action was taken despite ample record evidence before the trial court which was entirely consistent with the Court of Appeals' conclusion as to the proper methodology of valuation. The Court of Appeals, on Petitioner's motion for reargument, took no action to redress its unconstitutional denial of a hearing on the merits of the assessment, dismissing Petitioner's motion without opinion.

The Court of Appeals' final judgment was dated and entered on August 1, 1985, and is set forth in Appendix D. The Court of Appeals in a decision without opinion dated October 8, 1985, denied Appellant's motion for reargument. A copy of this decision is set forth in Appendix E.

Jurisdiction to review the final judgment of the Court of Appeals in this case is conferred on this Court by 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The pertinent Constitutional and statutory provisions are set forth in Appendix F hereto.

Statement of the Case

Petitioner, The Brooklyn Union Gas Company[2] ("Brooklyn Union"), is a gas utility serving energy needs of over

[2] Petitioner has no parent corporations. It has the following non-wholly owned subsidiary corporations: Honeoye Storage

(*footnote continued on following page*)

four million consumers in the counties of Kings, Queens, and Richmond in New York City. This Petition arises out of the dismissal by the New York Court of Appeals of Brooklyn Union's petition for review of the tax assessments of its special franchise property for the 1980-81 year. The assessments were made by the New York State Board of Equalization and Assessment ("SBEA"). The SBEA first made tentative assessments of Petitioner's special franchise property; Petitioner challenged these tentative assessments at the administrative level, whereupon the SBEA increased the tentative assessments.

Brooklyn Union then initiated this proceeding pursuant to Article 7 of the New York Real Property Tax Law ("R.P.T.L.") for judicial review of those final assessments. A special franchise is defined for purposes of assessment and taxation as including the value of tangible property (mains, pipes, tanks and appurtenances for conducting gas) "situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith." N.Y. R.P.T.L. § 102(17) (McKinney 1984).

The trial court and a unanimous Appellate Division held that Brooklyn Union's special franchise property had been over-assessed in the amount of approximately $106 million. The New York Court of Appeals reversed both the trial court and the appellate court.[3] It held that the exclusive method of valuing this special franchise property was an appraisal method known as reproduction cost new less depreciation ("RCNLD"). The Court then dismissed

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(footnote continued from preceding page)
Corporation and Boundary Gas Corporation. It has the following affiliated corporations: Tri-State Well Service, Inc., BHP Energy, Inc., and Fuel Resources Gathering Inc. It has no other affiliates.

[3] The Court of Appeals coupled this decision with another SBEA appeal from a separate decision in a different case. *National Fuel Gas Distribution Corp. v. SBEA*, 103 A.D.2d 187, 479 N.Y.S.2d 902 (3d Dept. 1984). That case involved a holding

(footnote continued on following page)

the petition, entirely ignoring the fact that the only credible evidence of RCNLD in the case was that introduced at the trial by the Petitioner through competent witnesses. This evidence showing value by the RCNLD method was offered by the Petitioner in great detail through the appraisal of Petitioner's expert and his testimony on direct examination. It was the subject of cross-examination by the attorneys for the SBEA and The City of New York, which appeared as intervenor-respondent. In ignoring this evidence and summarily dismissing the petition, the Court of Appeals in effect subverted its own holding, denied Petitioner any opportunity for a factual ruling on the merits of the property assessment, and deprived the Petitioner of due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

That its arbitrary dismissal of the petition was unconstitutional in light of the fact that the record demonstrated amply Petitioner's submission of evidence to the trial court in full compliance with the Court of Appeals' view of the law, was specifically called to the Court's attention by Petitioner's motion for reargument which was made shortly after the Court's summary dismissal of the case. The response from the Court was a further summary denial. There was no acknowledgment that Petitioner had pro-

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(*footnote continued from preceding page*)
company with two primary subsidiaries—a multi-state retailer of natural gas serving customers in Pennsylvania, Ohio and 12 counties in the far Western part of New York, and a multi-state wholesaler of natural gas in the same area. In contrast, Brooklyn Union is a local operating company, supplying gas to customers in only three counties in the City of New York. The course of the trial was also entirely different in that case which involved ten separate proceedings before a different judge. There, there was testimony by SBEA as to its method of assessment; here, there was none; there, the trial judge dismissed the petition; here, the trial judge upheld the petition and made substantial reductions in the assessment. Despite major differences between the two cases, the Court of Appeals joined them for argument and decision.

vided a full RCNLD appraisal; there was no explanation of any kind for the denial of the motion; nor was any reason provided for the arbitrary dismissal of the petition and the denial to Petitioner of any opportunity for a judicial ruling on the merits of its property assessment. The Court apparently continued incognizant of its own inherent inconsistency in setting up RCNLD as the exclusive measure of value while disregarding the Petitioner's extensive evidence before the trial court in developing that measure.

No evidence whatsoever was offered by the SBEA, the assessing agency. The trial court found that no weight could be given to the evidence offered by the intervenor, The City of New York.

I. The Opinion of the Court of Appeals

(1)

The Court of Appeals went astray, at the very outset of its opinion, by a simplistic and erroneous statement of the issue in the case. The issue was not, as the Court stated, between reproduction cost and capitalization of income. The real issue is between RCNLD as the exclusive measure of value and the universally-accepted standard of market value, which is defined as the price that a willing purchaser would pay and a willing seller would accept for the property.

The Petitioner's expert proceeded in the trial court on the basis that market value was the measure of "full value," universally approved by the courts and the appraisal profession. In determining the market value, the Petitioner's expert investigated the three standard approaches to market value: (1) comparable sales data; (2) original cost and reproduction cost; (3) capitalization of income. Because of the paucity of sales of similar property, the Petitioner's expert employed cost data (including reproduction cost) and earnings data. He made extensive

investigations of both types of data and rendered a detailed appraisal report which was received in evidence. By ignoring the Petitioner's expert's punctiliously-prepared report of RCNLD, the Court of Appeals contradicted its own holding accepting RCNLD as the exclusive measure of value and deprived the Petitioner of due process of law in the form of a judicial ruling on the merits of its property assessment under the RCNLD standard embraced by the Court.

(2)

The Court of Appeals' opinion stated:

> The issue presented on these appeals is whether the special franchise properties of the Brooklyn Union Gas Company, and those of National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation, are specialty property, to be valued for special franchise assessment and taxation purposes by the reproduction-cost-new-less-depreciation (RCNLD) method, or whether a capitalization-of-income method of valuation is an acceptable method of valuation of such property. The Appellate Division, in both cases, has held that the petitioners' special franchise properties are not "specialty properties" and therefore that the capitalization-of-income method is an acceptable method of assessing the value of special franchise property in New York State. We disagree and therefore reverse the Appellate Division orders appealed from.

65 N.Y.2d at 472, 492 N.Y.S.2d at 600.

The opinion of the Court of Appeals then summarized a portion of the record on the trial as follows:

> At the trial of the Brooklyn Union proceeding, SBEA did not file an appraisal report or offer any testimony through its personnel as to the

valuation method employed. Rather, it relied on the appraisal report and testimony of an expert employed by the City of New York (the City had been granted leave to intervene). The trial court rejected his testimony, finding that he lacked sufficient background and experience to qualify as an expert appraiser of special franchise property. The court also rejected his appraisal report because it failed to comply with the rules of the Appellate Division as to form and content. The court concluded that the record was barren of any evidence of the appraisal method employed by SBEA in arriving at its valuations. The court noted that the City's expert used the RCNLD method, but that the value he arrived at was more than $100,000,000 higher than that arrived at by SBEA. The court concluded that he did not perform the assessments for SBEA.

The court accepted the expert opinions of the petitioner's witnesses and their valuation of the special franchise property, which appraisals and valuations were arrived at through capitalization-of-income and original-cost-less-depreciation (rate base) appraisal methods. The court accepted the capitalization-of-income method of valuation as "a legitimate method for valuing a special franchise *** especially when the only evidence in the record is that the system, if reproduced, would not be reproduced in its present form." The court determined the final equalized values of Brooklyn Union's special franchise property, located in Kings, Queens and Richmond Counties, for the tax year 1980-81, to be $83,336,183, $45,511,625 and $25,990,355 respectively. These valuations were significantly lower than the final assessments of SBEA.

65 N.Y.2d at 483, 492 N.Y.S.2d at 601.

The Court's opinion is conspicuously bereft of any mention of Petitioner's full-blown RCNLD appraisal and the evidence submitted by Petitioner regarding RCNLD.

(3)

The affirmance of the trial court by the Appellate Division was summarized by the Court of Appeals as follows:

> The Appellate Division affirmed, concluding that the "capitalization of income method used [by petitioner's experts] herein provides the most accurate method of determining value", and that rejection of the RCNLD method of appraisal was proper since "the system would never be reproduced in its present form but would be replaced with a new completely modern system". The court found that, in the parlance of an expert real estate appraiser, "[r]eproduction means replacement with an exact model" which "[i]n this case *** is totally unrealistic". Thus, the court held that Brooklyn Union's franchise property "could not be considered a specialty since it is unreasonable to conclude that the facility could be replaced on an economic basis." The court noted, moreover, that it would "reach the same result even if the facility were considered a specialty".

65 N.Y.2d at 483, 492 N.Y.S.2d at 601.

(4)

The Court of Appeals concluded that "the proper method of valuing their tangible property is by RCNLD. . . . " *Id.* at 488, 492 N.Y.S.2d at 604.

The Court totally ignored the Petitioner's RCNLD evidence developed in the trial court, choosing instead to render judgment as follows: "The order of the Appellate

Division in *Brooklyn Union Gas Co.* should be reversed, the petition dismissed and SBEA's determination reinstated." *Id.*

In light of the fact that the only credible evidence of RCNLD introduced at the trial was that introduced by the Petitioner, the summary dismissal of the petition was in direct contradiction of the Court's holding that the proper method of valuation was RCNLD. The Court's arbitrary dismissal of the petition was thus in clear violation of the due process clauses of the Fifth and Fourteenth Amendments. It denied to Petitioner any opportunity for a judicial determination on the merits of its property assessment valued by the RCNLD standard embraced by the Court of Appeals.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Petitioner's Constitutional Right to Due Process was Violated by the Court of Appeals' Dismissal of the Case Despite Petitioner's Ample Competent Record Evidence on the Proper Method of Valuation.

(1)

As permitted by New York statutory law, Petitioner at trial presented alternate theories of overvaluation,[4] among them, capitalization of income and RCNLD. The trial court and the Appellate Division chose to focus upon capitalization of income as the appropriate appraisal method for valuing Petitioner's property. The Court of Appeals held that RCNLD was the only proper method.

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[4] Section 3014 of the New York Civil Practice Law and Rules permits alternate theories to be presented and provides that "*[s]eparate causes of action* or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be *stated alternatively or hypothetically.*" N.Y. C.P.L.R. §3014 (McKinney 1974) (emphasis added).

Petitioner has never abandoned or renounced the RCNLD evidence which it presented at the trial.[5]

(2)

The Court's egregious error apparently resulted from its beguilement by the label "specialty" which it attached to Petitioner's special franchise property. The Appellate Division held that Petitioner's special franchise property was not a "specialty" and that even if it were to be so considered, capitalization of earnings was an appropriate measure of value. The Court of Appeals failed to grasp the fact that so-called "specialty" properties are of two kinds: (1) those that are designed for profit and are revenue-producing and (2) those that are designed for non-profit purposes and produce no revenue. In valuing the former, the revenue they produce is the chief determinant of value. The latter, which include such properties as churches, synagogues, schools, and museums, are not operated for profit; there is no revenue to be considered and so, *faute de mieux*, the appraiser must, of necessity, fall back on a cost standard, like RCNLD.

The Court of Appeals in effect created a conclusive and irrebuttable presumption that once a property was denominated a "specialty" that designation ruled out any proof of its value other than reproduction cost new less depreciation. This Court has long disfavored irrebuttable presumptions, *Vlandis v. Klein*, 412 U.S. 441 (1973), whether the irrebuttable presumption is created by statute or by judicial fiat. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 678 (1930). In this case, the Court went far beyond the irrebuttable presumption doctrine. It not only set up RCNLD as the

[5] By the RCNLD method, Petitioner's expert, Mr. Breitling found overvaluation of approximately $97 million before economic obsolescence which is close to his $106 million overvaluation derived from the capitalization of income method which the trial court and lower appellate court favored. Ex. 17.

one only and exclusive method of valuation, it did not even acknowledge that Petitioner had detailed credible evidence of RCNLD which had neither been rejected nor even reviewed in the record.

In other words, on the trial, the Petitioner Brooklyn Union presented for the Court's consideration two methods of valuation: RCNLD and capitalization of income; the two methods and the two estimates could be considered either as alternatives of each other or as supplements to each other. There were no opposing methods or estimates presented by the respondents which the trial court and the Appellate Division found credible. Under the circumstances, and in the state of the record, the Court of Appeals should have affirmed. If the Court of Appeals found some error either in emphasis or consideration by the fact-finding lower courts, it should have reversed and remanded for further consideration. But when it averted the testimony as to RCNLD which the Petitioner had presented and summarily dismissed the petition, it not only committed an error under state law, it also committed an outright violation of the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Petitioner's brief on its motion for reargument specifically called to the attention of the Court of Appeals the record evidence presented by the Petitioner on the RCNLD method espoused by the Court of Appeals. Petitioner placed in evidence (Exhibit 17) an appraisal which included a comprehensive RCNLD analysis. The RCNLD testimony of Petitioner provided full detail and explanation of an RCNLD valuation, the same approach which the Court of Appeals held to be the only proper approach to value. It was offered by Mr. Julius Breitling, a vice-president of Ebasco Services, Inc., a mechanical engineer as well as a public utility appraiser, who was characterized by the Appellate Division as a recognized expert in the field of public utilities and as "eminently qualified." He

testified extensively on his detailed development of an RCNLD estimate of value and was exhaustively cross-examined on it by counsel for both respondents.

This acknowledged valuation expert did not simply allude to RCNLD in passing but actually presented a full-blown RCNLD appraisal to the trial court. The appraisal also was in the record before the Appellate Division. (R. 1012). Petitioner's RCNLD appraisal exhibit and testimony remain unreviewed and unchallenged by any of the courts (trial court, Appellate Division, and Court of Appeals).

Petitioner's expert witness, Mr. Breitling, in fifteen pages of direct testimony (R. 451-65), described his RCNLD reasoning and calculations. Perhaps the most graphic demonstration of Mr. Breitling's comprehensive estimate of RCNLD is found in his cross-examination. There, the record shows a total of more than one hundred-fifty (150) pages, including the first seventy pages, of cross-examination (out of some two hundred-forty pages) which reflect opposing counsels' efforts to challenge and test this witness' RCNLD estimate. The Petitioner's expert's evidence of RCNLD did not slip into the record unnoticed. It was subjected to the most intensive cross-examination by opposing counsel. RCNLD was also covered on both redirect examination and recross. (R. 714-18).

Within Exhibit 17, the appraisal by Petitioner's expert, is an extensive Table (I) called "The Brooklyn Union Gas Company Determination of Reproduction Cost New Less Depreciation of Special Franchise Property as of December 31, 1979" and listing twelve steps showing in separate columns the reproduction cost data for gas mains, gas services and measuring and regulating equipment. The appraisal Exhibit continues with twelve more pages which explain in detail the various calculations which resulted in this expert's estimate of RCNLD. The appraisal also contains six appendices listing additional detail and calculation by which the witness arrived at his final reproduction cost estimate.

Petitioner thus had before the Court an appraisal—a comprehensive RCNLD analysis—the methodology that the Court of Appeals has espoused. Mr. Breitling's calculations on that basis are spread on the record in his appraisal report, in his direct examination, in his cross-examination by the attorneys for both respondents and in his redirect testimony. The trial court, having rejected the sole opposing appraisal witness as unqualified and the Appellate Division having followed suit, the only credible RCNLD evidence in the record was Brooklyn Union's and its petition should not have been dismissed. The arbitrary dismissal on motion for reargument precluded any possibility of a factual judicial determination according to the method the Court of Appeals promulgated as proper. The arbitrary dismissal of the petition is a violation of the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

II. The Court of Appeals' Dismissal is in Direct Contrast to that Court's Previous Treatment of Other Petitioners Where Record Evidence on the Proper Theory was Submitted.

That the Court of Appeals' harsh summary dismissal of the petition was unconstitutional is highlighted by the fact that the Court's action was a departure from its own customary treatment of petitioners in tax review cases where the Court on appeal determined that a different method of valuation should have been utilized at trial.

For example, petitioner in *Metropolitan Life Insurance Co. v. Tax Commission*, 53 N.Y.2d 1050, 442 N.Y.S.2d 489 (1981), like Brooklyn Union, sought judicial review to obtain a reduction in a tax assessment. The parties disagreed on the proper basis for determining the factual question of value. While both agreed on a capitalization of income approach, the petitioner sponsored use of a multiple-tenant standard to arrive at net income, while the

Tax Commission argued that the single-tenant standard must be used. The trial court adopted the petitioner's approach and reduced the assessment. The Appellate Division preferred the Tax Commission's method, and reinstated the assessment. When the Court of Appeals reversed the Appellate Division order because the approach used by the trial court was found to be valid, it remitted to the Appellate Division for further proceedings because that court could determine the factual valuation issue on a record that was already complete. Here, the record, which is replete with evidence of RCNLD, is also complete. Therefore, to preserve Brooklyn Union's due process rights to a ruling on the merits of its property assessment, the matter should have been remitted to the Appellate Division to make the factual determination of value on the already complete trial record.

In proceedings for tax review, the lower appellate courts consistently have applied the Court of Appeals' approach and afforded the parties every opportunity to have "their day in court." Thus, in *Pepsi-Cola Co. v. Tax Commission*, 19 A.D.2d 56, 240 N.Y.S.2d 770 (1st Dept. 1963), the court, after observing that ordinarily it would reinstate the original assessment which had been reduced below, went on to say:

> Upon due consideration of all relevant factors, so far as developed by the evidence in the record here, it appears that the reduction of the assessment for the year 1960-61 as directed by the trial court, is not supported. This would ordinarily call for a reinstatement of the assessment by this court. But, because the parties were in some misapprehension as to the proper methods to be followed by their experts in the making of their appraisals, they have failed to properly and fully develop all factors which are relevant to the question of the value of this property for assessment purposes for the year 1960-61. Consequently, in the interests of justice, the order of Special Term should be modified to remand for a new

> trial with respect to the issues appertaining to the assessment for the said tax year, and the order should be otherwise affirmed, without costs.

19 A.D.2d at 61-62, 240 N.Y.S.2d at 777.

In *Mobil Oil Corp. v. Tax Commission*, 60 A.D.2d 910, 401 N.Y.S.2d 565 (2d Dept. 1978), there was no expert testimony at all and petitioner's only proof consisted of the sale of the property on August 1, 1970, and an income and expense statement for the year in issue. However, despite the paucity of petitioner's evidence, the court, on the law and in the interests of justice, reversed dismissal of the petition and remanded for a rehearing, citing the *Pepsi-Cola* decision. In the present case, Petitioner has submitted extensive testimony on RCNLD and an RCNLD appraisal while the respondents, in the judgment of the trial court, the finder of fact, failed to submit any credible evidence at all. The facts in the record here required either an affirmance by the Court of Appeals or at least a remand for determination of value based upon Petitioner's RCNLD evidence.

Still another case where, due to misapprehension below as to the proper legal approach, the appellate court remanded for a new trial is *BCA-White Plains Lanes, Inc. v. Glaser*, 91 A.D.2d 633, 457 N.Y.S.2d 299 (2d Dept. 1982), *appeal dismissed*, 59 N.Y.2d 673 (1983), where the court said:

> Thus, both sides were under a misapprehension and erred in their valuation approaches. We further find that respondents' Elmsford Bowling Lanes sale comparable is insufficient and inadequate to alone sustain the assessments. Under all of the circumstances, justice requires that there be a new trial (see *Matter of Pepsi Cola Co. v. Tax Comm. of City of N.Y.*, 19 AD2d 56).

91 A.D.2d at 635, 457 N.Y.S.2d at 302.

Of significance on this point is *Property Portfolio 182 Corp. v. Tax Commission*, 58 A.D.2d 650, 396 N.Y.S.2d 72 (2d Dept. 1977), where the court said:

> In our opinion, petitioner has succeeded in overcoming the presumed validity of the assessments but, due to its misapprehension as to the proper method to be followed by its expert in the making of his appraisal, has failed to develop all of the factors relevant to the question of the value of this property in the tax years being reviewed. Consequently, the proceeding should be remanded for a new hearing where these issues may be fully explored (*See Matter of Pepsi-Cola Co. v. Tax Comm. of City of N.Y.*, 19 AD2d 56).

58 A.D.2d at 651, 396 N.Y.S.2d at 73-74.

The court there concluded:

> Notwithstanding petitioner's proof that the property was overassessed, we do not believe that its method of appraisal was proper in this case. While that method may be used in certain condemnation cases (see *Matter of Port Auth. Trans. Hudson Corp. [Hudson Tubes Purposes]*, 48 Misc 2d 485, mod 27 A.D.2d 32, mod 20 NY2d 457; cf. *Matter of City of New York [644 Baltic St. Realty Corp.]*, 44 AD2d 599), its usefulness and accuracy in finding a value at a past tax status date is questionable. A new hearing will enable the court to arrive at a correct valuation.

58 A.D.2d at 652, 396 N.Y.S.2d at 74.

In the present proceeding, even if the courts below arrived at the result by using an erroneous theory, their conclusions of gross overvaluation and incorrect assessments are still supported by Petitioner's substantial and uncontroverted evidence of RCNLD—the Court of Appeals' preferred method. Accordingly, the petition should not have been dismissed. Departing from what has long been customary practice in the courts of New York State, the

Court of Appeals has denied to the Petitioner its day in court in violation of elementary considerations of due process.

III. This Case Presents Important Federal Questions Relating to Public Utility Property Valuation and Involving the Enormous Detrimental Impact the Court of Appeals' Decision Will Have Upon Consumers of Energy as well as Litigants in Other State Cases.

(1)

Mr. Justice Thurgood Marshall has sounded a warning concerning "state action" which applies here with striking force. He said: "Very often state action—either legislative, executive or judicial—is dictated by the consideration that the end justifies the means." T. Marshall, *Remarks at Harvard University Law School Conference on "Government Under Law: Judicial Method in Due Process Inquiry"* (September 22, 1955) (reprinted in Harvard Law School Bulletin 347, 348 (1956)).

The *amici curiae* in the Court of Appeals, representing certain municipal entities, pressed on the Court, without any support in the record, the assertion they would have to make large refunds if the lower courts' decisions in favor of the Petitioner were affirmed. The corporation counsel of the City of New York on the argument before the Court of Appeals alleged that an affirmance would be "catastrophic." They persuaded the Court of Appeals to accept a method of valuation which purportedly got them off the hook on which the outrageous overassessments by the SBEA had impaled them.

Imposing heavy taxes by excessive valuations of the property of the local public utility, which the utility must collect from its customers in the form of higher utility rates, enables the taxing authorities to escape culpability

and responsibility for their heavy exactions by camouflaging them as utility rates. Neither the higher utility rates directly attributable to these taxes nor any refund from such exactions accrue to the benefit of Brooklyn Union or its stockholders. The New York Public Service Commission has made it clear that any refunds obtained by Brooklyn Union because of illegal and excessive taxation would be returned to the natural gas consumers from whom they were collected.[6] In fact, the higher rates which the utility must collect are a distinct detriment to it since such rates impair its competitive position vis-a-vis other strong competitors who supply alternative fuels, such as oil.

Dean Griswold has written that due process is "an idea born out of the hearts of men. . . . Perhaps the essential thought can be put by saying that due process has some application wherever men feel a sense of injustice." E. Griswold, THE FIFTH AMENDMENT TODAY 37 (1955).

We do feel a sense of injustice. We are in the business of supplying gas to a community which includes some of the poorest and most deprived persons in the nation.[7] Yet substantially by reason of unconscionably high tax assess-

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[6] The Public Service Commission filed an *amicus* brief in the Court of Appeals proceeding in support of Brooklyn Union and its gas consumers. In that brief the Commission stated that "it is conceivable that the Commission would require the entire refund to be passed through to the company's ratepayers. Finally Brooklyn Union's ratepayers would continue to benefit from a ruling requiring tax refunds because the company's reduced property tax expense would result in lower future utility bills." (N.Y. P.S.C. *Amicus* Brief dated January 7, 1985 at p. 7).

[7] The Public Service Commission noted in its *amicus* brief that "Brooklyn Union has the third highest gas rates of any gas utility in the United States." (N.Y. P.S.C. *Amicus* Brief at p.6, n.2). Approximately 38% of its customers are on fixed income, elderly or below the poverty line. These excessive assessments impact disproportionately upon the poor and elderly who, by necessity, must spend a larger percentage of their income on the cost of energy than other segments of the population served by Brooklyn Union.

ments Brooklyn Union's rates are among the highest in the nation. Believing that the laws of the State of New York afforded us a remedy, we went to court protesting the tax assessments. The constitution of the State of New York decrees that tax assessments on property may not exceed "full value." We proved on the trial that the tax assessments against our special franchise properties were far in excess of "full value." We did this by using different recognized criteria of value including RCNLD which, our Court of Appeals now says, is the proper method of valuing this property. The respondent SBEA offered no witnesses or reply and relied on a witness of the intervenor whose testimony was given no weight. The trial court, having heard the witnesses, agreed with us and adjudged that the assessments should be reduced by more than $106 million. The trial court's findings were unanimously approved by the highest fact-finding tribunal in the State—the Appellate Division. The Court of Appeals, whose constitutional jurisdiction does not extend to matters of fact, completely disregarded the record in our case and summarily dismissed our petition though our evidence fulfilled the very criterion which the Court held was proper and acceptable.

(2)

The Court's summary foreclosing of all further adjudication in this case is contrary to established practice of the courts in the State of New York that has allowed a litigant in a valuation case to, in effect, plead over when he has submitted an appraisal on a basis that the Court deems inappropriate. In this case, the Petitioner did not need to plead over—it had already submitted an appraisal on the very same basis that the Court held to be appropriate. When the Court, in spite of this, summarily dismissed the petition, it deprived the Petitioner of its day in court in violation of the due process clause of the U.S. Constitution.

(3)

As advocates presenting causes of action to the courts of the State of New York, we are especially concerned about

the procedure followed by the Court of Appeals in this case. The significance of the Court's holding for us as lawyers is that it puts on us, on penalty of dismissal of our client's case, the burden of guessing in advance which of several possible answers the Court will give to the legal problem presented by the case. The dilemma posed for the lawyer by varying possible solutions is recognized in the Civil Practice Law of New York State which allows the litigant to present alternative and even inconsistent answers to legal problems. In refusing to recognize the possibility of the existence of different answers to a legal problem, the action of the Court of Appeals compels the lawyer to stake his client's case on his judgment as to which of several answers the court will ultimately give. To place the advocate or the practicing lawyer in such a predicament is to convert a lawsuit into an aleatory situation, no more predictable than a game of chance. To shut the door to all legal theories which a legal case may present makes of a lawsuit no more than a ticket in a lottery, not a rational, reasoned pursuit of the ends of justice. Here, both of the fact-finding tribunals of the state viewed this case favorably to Petitioner on one of two possible methods of valuing the Petitioner's property and they chose what they considered the more appropriate valuation method. The Court of Appeals disagreed and chose the other alternative. Instead of recognizing that Petitioner had also presented a detailed case on this alternative method, instructing the lower fact-finding tribunals and remanding the case for further adjudication on what it considered the preferable method of valuation, the Court of Appeals summarily dismissed the petition and shut off all further consideration of what it had chosen as the preferred alternative.

Though this action of the Court of Appeals is cloaked as a mere technical choice between two opposing standards of value, the Court's judgment, ignoring a competent alternative presentation, affects all practitioners and, here alone, a vast investment that touches the lives of some

four million consumers who rely on Brooklyn Union to supply, at rates they can afford, the energy they daily consume in running their homes and businesses.

Summary and Conclusion

The question of valuation of public utility property is a matter of great importance in both Federal and state courts. This Court has amply instructed, in a long line of cases stretching from *Smyth v. Ames,* 171 U.S. 361 (1898), at least to *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944), that there is much more to the valuation of public utility property than the simplistic, irrebuttable presumption that the Court of Appeals has found in RCNLD. In promulgating that criterion as a conclusive presumption and exclusive criterion of value and arbitrarily dismissing the petition, the Court of Appeals refused to allow consideration of the Petitioner's entire RCNLD case which had already been extensively canvassed at all stages of the trial—on direct examination, on cross-examination, on redirect, and expounded in great detail in the appellate briefs before the Appellate Division and the Court of Appeals and on the motion for reargument in the Court of Appeals.

In ignoring the detailed alternative case presented by the Petitioner (particularly where that case met all of our highest Court's tests), Petitioner's Constitutional rights to a fair hearing were denied. To allow the highest court to blind itself to alternative theories which are presented properly under the authorized evidentiary rules makes it impossible for any petitioner, public utility or not, to avail itself of the remedial procedures prescribed by state statute. The decision of the Court of Appeals in this case raises questions of Constitutional dimensions that deserve the attention of this Court.

In short, the New York State law provides us with the remedy of judicial review of property tax assessments. The decision of the Court of Appeals in this case arbitrarily

dismissing the petition makes of this remedy a snare and delusion. The Court of Appeals purports to render a reasoned determination, but by its arbitrary dismissal of the petition it deprives the Petitioner of the opportunity to follow the Court's rule to its logical conclusion and obtain a determination on the merits.

For these reasons, a Writ of Certiorari should issue to review the decision of the New York Court of Appeals.

Respectfully submitted,

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